

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BNSF RAILWAY COMPANY,

Plaintiff,

UNION PACIFIC RAILROAD
COMPANY, and PORT OF BENTON,

Plaintiff-Intervenors,

v.

TRI-CITY & OLYMPIA RAILROAD
COMPANY LLC,

Defendant.

NO. CV-09-5062-EFS

**ORDER GRANTING BNSF'S MOTION
FOR SUMMARY JUDGMENT, DENYING
TCRY'S MOTION FOR SUMMARY
JUDGMENT, AND DENYING ALL
OTHER PENDING MOTIONS AS MOOT**

Before the Court, without oral argument, are Plaintiff BNSF Railway Company's (hereinafter "BNSF") Motion for Summary Judgment, ECF No. [267](#), and Defendant Tri-City & Olympia Railroad Company LLC's (hereinafter "TCRY") Motion for Summary Judgment, ECF No. [273](#). Also before the Court are BNSF's Motion to Compel Discovery Propounded to Defendant Tri-City & Olympia Railroad Company, L.L.C., ECF No. [305](#), and TCRY's Motion for Protective Order, ECF No. [316](#). After reviewing the submissions of the parties and applicable authority, the Court is fully informed. For the reasons discussed below, the Court grants BNSF's Motion for Summary Judgment, denies TCRY's Motion for Summary Judgment, and denies all other pending motions as moot.

1 **I. BACKGROUND¹**

2 **A. 1947 Agreement**

3 On November 6, 1947, the United States, acting through the U.S.
4 Atomic Energy Commission ("Commission"), entered into an agreement ("1947
5 Agreement") with several railroads to establish service to the Hanford
6 Nuclear Reservation ("Hanford site"). BNSF and Union Pacific Railroad
7 Company ("UP"), the undisputed successors-in-interest to the 1947
8 Agreement, were granted "equal joint" operating rights over trackage
9 beginning near Kennewick and extending north of Richland to the Hanford
10 site ("Richland Trackage").

11 The 1947 Agreement identifies the rights of the parties to railway
12 lines as shown on an August 25, 1947 map attached to the Agreement as
13 "Exhibit A." The 1947 Agreement acknowledges that "the Government has
14 constructed on its property a line of railway . . . extending from

15 _____
16 ¹ In connection with their motions, the parties submitted Joint
17 Statements of Uncontroverted Facts. ECF Nos. [281](#) & [294](#). The Court treats
18 these facts as established consistent with Federal Rule of Civil Procedure
19 56(d), and sets these forth in this "Factual Background" section without
20 reference to an ECF number. Any disputed facts are supported by a
21 citation to the record. The Court has reviewed the record supporting the
22 parties' cross-motions for summary judgment, and finds that there are no
23 issues of material fact precluding summary judgment. See *Fair Housing*
24 *Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136
25 (9th Cir. 2001) (discussing district court's duty to review the record
26 when ruling on cross-motions for summary judgment).

1 Hanford, Washington, southerly to a point near the north bank of the
2 Yakima River," and states as its purpose that "the Government desires to
3 have a direct rail connection to the south so as to interchange business
4 with [BNSF and UP's predecessors in interest]." To this end, Article V
5 of the 1947 Agreement grants BNSF and UP's predecessors in interest the
6 "equal joint right" to operate on the rail line and "to use said
7 interchange facilities and wye for the purpose of interchanging business
8 with the Government." Article VII of the Agreement states that BNSF and
9 UP's predecessors in interest "each of itself agrees to deliver and
10 receive at said interchange facilities all business which either is
11 obligated to transport as a common carrier railroad." Article IX of the
12 Agreement imposes an obligation on BNSF and UP's predecessors to "agree
13 from time to time upon rules and regulations covering the movement of
14 engines, cars and trains over the line B-E and on said interchange
15 facilities."

16 The map attached to the 1947 Agreement identifies several points,
17 labeled A through E. Point A is in Kennewick, and points B, C, and D
18 extend along the rail line in a northwesterly direction toward the Hanford
19 site. The map identifies point E as a location to the north of Richland
20 upon which interchange tracks were to be built. The government later
21 constructed an interchange facility at Point E, and today, Point E is
22 TCRY's rail yard and is still operated as an interchange facility. Though
23 the 1947 map identified a location to the south of the interchange tracks
24 for the wye, the wye was in fact later built to the north of the
25 interchange tracks.²

26 ² A wye is a triangular arrangement of rail tracks designed to allow
ORDER * 3

1 In 1948, the 1947 Agreement was the subject of a ruling by the
2 Interstate Commerce Commission (ICC). Because the government was the only
3 "customer" served by BNSF and UP's predecessors, the railroads sought
4 exemption from the required public convenience and necessity
5 certifications for common rail carriers. The ICC's Order held that a
6 certificate was required because the railroads would also provide common
7 carrier services to businesses in and around Richland. The ICC's Order
8 modified terms in the 1947 Agreement regarding payment and rights to
9 termination, but left the remainder of the Agreement undisturbed.

10 **B. 1961 Agreement**

11 In 1961, the Commission entered into a second agreement ("1961
12 Agreement") with the Railroads. Section 1 of the 1961 Agreement leased
13 three specified areas of track to the railroads. Section 2 of the
14 Agreement granted "the Railroads, and the industries served by them, the
15 right to construct additional industrial spur, set-out, and such other
16 tracks connecting with the Government's main tracks or classification
17 yards as may be required to provide rail service for industries." Section
18 3 of the 1961 Agreement states as follows:

19 The Commission hereby grants the Railroads the right to
20 operate with their employees and equipment over such segments
21 of the Government's tracks shown on Exhibit "A" as it may be
necessary to use for the purpose of moving freight shipments
to or from the tracks covered by this agreement.

22 Section 3's grant of authority was consistent with the agreement's stated
23 purpose of allowing the railroads to operate on the United States' tracks
24 "for the sole purpose of receiving and delivering shipments routed via the
25

26 _____
railway equipment to change direction by performing a "three-point turn."

1 Railroads and consigned by or to shippers and receivers located on said
2 spur or side tracks."

3 The rail line depicted in a 1960 map attached as Exhibit A to the
4 1961 Agreement begins south of Richland at the Yakima River Bridge, and
5 extends to a Department of Energy (DOE) "barricade" roughly one thousand
6 feet north of the wye tracks. The three segments of track leased in the
7 1961 Agreement are all south of the interchange facility and wye.

8 In 1979, the United States entered into an agreement with the
9 railroads converting the 1961 lease agreement into a permit so that the
10 tracks could be classified as surplus under the Federal Property and
11 Administrative Services Act of 1949. This agreement deleted Sections 1
12 and 4 of the 1961 Agreement, which detailed the terms of the lease and the
13 railroads' maintenance obligation, but left the 1961 Agreement's other
14 provisions "in full force and effect."

15 **C. 1998 Indenture**

16 In 1998, the United States, acting through the DOE, conveyed
17 ownership of a six-mile section of track to the Port of Benton ("Port")
18 through an Indenture, thereby assigning the DOE and Commission's rights
19 under the 1947 and 1961 Agreements to the Port. The indenture stated that
20 the 1947 and 1961 Agreements and the 1979 permit agreement governed access
21 to the Railroad. The Indenture also stated that the Port, as assignee,
22 agreed to be bound by the obligations and considerations in the United
23 States' permit. As a result of these agreements, the Port has the right
24 to terminate BNSF and UP's rights to use the Richland Trackage upon six
25 months notice.

26 /

1 **D. Interchange Agreement**

2 On October 1, 1998, the Port entered into a Maintenance and Operation
3 Agreement with TCRY's predecessor, Livingston Rebuild Center, Inc.
4 ("Livingston"), under which it agreed to pay Livingston \$325,000 per year
5 for the maintenance of the Richland Trackage. These contractual rights
6 and obligations were subsequently assigned to TCRY.

7 In May 2000, BNSF and TCRY contracted to interchange cars going into
8 the Richland Trackage ("Interchange Agreement"). They exchanged cars at
9 the Richland Junction, and TCRY served BNSF's customers along the Richland
10 Trackage. TCRY maintained the trackage at its own expense and began
11 charging a per-car fee for its services. This contract specifically
12 reserved BNSF's rights under the 1947 and 1961 Agreements.

13 In a September 12, 2000 letter to then-TCRY President John Haakenson,
14 the Port's Assistant Executive Director Scott Keller acknowledged that the
15 Port was paying TCRY to maintain the railroad under a contract that
16 allowed TCRY to charge a fee for its railroad operations, the revenue from
17 which would offset the cost of maintenance. Recognizing that UP was using
18 the Richland Trackage without paying a fee, the Port directed TCRY "to
19 give written notice to [UP] terminating its rights to use the Port of
20 Benton track." Beginning November 14, 2000, UP could no longer continue
21 its unauthorized use of the Richland Trackage: it would need to establish
22 an interchange agreement with TCRY.

23 From approximately April 2001 through November 2001, TCRY and BNSF
24 continuously disagreed about BNSF's right to operate on the Richland
25 Trackage. BNSF claimed the 1947 and 1961 Agreements allowed it to
26 directly operate on the Richland Trackage without interchanging; TCRY

1 maintained that BNSF could only operate on the Richland Trackage if it
2 operated under the Interchange Agreement. This disagreement about BNSF's
3 rights to operate on the Richland Trackage forms the essential controversy
4 before the Court today.

5 **E. Railroad Lease**

6 In 2002, TCRY and the Port negotiated a lease agreement ("Railroad
7 Lease") that authorized TCRY to provide rail and track maintenance
8 services on the Richland Trackage. Paragraph 7.4 of the lease agreement
9 states that TCRY "shall not take any actions which will amend, modify,
10 terminate or invalidate any existing contracts which the Port has with any
11 other railroad carrier, without the Port's prior written consent."

12 **F. Legal Action**

13 In 2009, BNSF informed TCRY that it intended to exercise its rights
14 to directly operate on the Richland Trackage. TCRY objected, and on July
15 20 and 21, 2009, TCRY erected a barrier which physically prevented a BNSF
16 locomotive from reaching BNSF customers along the Richland Trackage. A
17 few days later, TCRY requested that the Port terminate the Richland
18 Trackage agreements with BNSF. The Port refused.

19 BNSF filed this suit on July 20, 2009. ECF No. [1](#). UP moved to
20 intervene on August 4, 2009, ECF No. [26](#), and the Court granted UP's
21 motion. ECF No. [46](#). On August 12, 2009, the Court granted BNSF's motion
22 for a preliminary injunction, prohibiting TCRY from blocking BNSF's access
23 to the Richland Trackage and requiring TCRY to charge its customary fee.
24 ECF No. [46](#) & [93](#). TCRY filed an interlocutory appeal on September 9, 2009,
25 which was voluntarily dismissed. ECF Nos. [67](#), [101](#), [108](#) & [109](#). Since
26 August 15, 2009, BNSF and TCRY have been operating under the Proposed

1 Operating Plan created to comply with the Court's preliminary injunction.
2 ECF No. [52](#).

3 On March 8, 2010, the Court granted the Port of Benton's request to
4 intervene. ECF No. [121](#). On June 2, 2010, TCRY filed a separate but
5 related action in Benton County Superior Court against the Port, asserting
6 claims for inverse condemnation, breach of contract, breach of implied
7 covenant of good faith and fair dealing, promissory estoppel, and quantum
8 meruit. ECF No. 209-[1](#). By order dated August 20, 2010, the Superior
9 Court stayed the state court action pending resolution of the federal
10 claims in this Court. ECF No. 209-[2](#).

11 On September 29, 2010, the Port amended its complaint, asserting that
12 TCRY breached Railroad Lease Paragraph 7.4, which prohibits TCRY from
13 "amend[ing], modify[ing], terminat[ing], or invalidat[ing]" other
14 railroads' existing contractual relationships with the Port, when it
15 temporarily blocked BNSF Railroad Company (BNSF)'s access to the Richland
16 Trackage in July 2009. ECF No. [136](#). TCRY asserted several counterclaims
17 against the Port, including inverse condemnation, breach of contract,
18 breach of implied covenant of good faith and fair dealing, promissory
19 estoppel, quantum meruit, and tortious interference with contract. ECF
20 No. [165](#), ¶¶ 18-24.

21 TCRY filed a motion for summary judgment on October 20, 2010, seeking
22 dismissal of the Port's Amended Complaint. ECF No. [142](#). On November 24,
23 2010, the Port moved for summary dismissal of TCRY's counterclaims. ECF
24 No. [171](#). TCRY then moved on December 17, 2010, to remand the inverse
25 condemnation claims to state court for determination where they were
26 originally asserted. ECF No. [200](#). On July 1, 2011, the Court denied

1 TCRY's Motion for Summary Judgment and Motion for Remand. ECF No. [264](#).
2 The Court's Order granted the Port's Motion for Partial Summary Judgment,
3 dismissing TRCY's counterclaims against the Port. [Id.](#) In denying TCRY's
4 Motion for Summary Judgment, the Court found that under the 1947 and 1961
5 Agreements, BNSF and UP have "equal joint" rights to operate directly upon
6 the Richland Trackage, and that TCRY took its lease of the Richland
7 Trackage subject to BNSF and UP's rights. [Id.](#)

8 TCRY and BNSF now both move for summary judgment regarding the nature
9 and extent of BNSF and UP's rights to operate on the Richland Trackage.
10 ECF Nos. [267](#) & [273](#). TRCY asserts that BNSF and UP's rights under the
11 Agreements are limited to use of the trackage only up to the interchange,
12 or alternatively, the wye, and that BNSF may use those portions of track
13 for interchange purposes only. BNSF argues that their right to operate
14 directly extends to all Richland Trackage south of the old Department of
15 Energy barricade, and is subject only to the limitation that it be used
16 "for the purpose of moving freight shipments." After reviewing the record
17 in this matter, the arguments of the parties, and applicable authority,
18 the Court is fully informed. Because the 1947 and 1961 Agreements give
19 BNSF and UP the right to operate directly on the entirety of the Richland
20 Trackage, the Court denies TRCY's motion and grant BNSF's motion.

21 **III. DISCUSSION**

22 **A. Summary Judgment Standard**

23 Summary judgment is appropriate if the "pleadings, the discovery and
24 disclosure materials on file, and any affidavits show that there is no
25 genuine issue as to any material fact and that the moving party is
26 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once a

1 party has moved for summary judgment, the opposing party must point to
2 specific facts establishing that there is a genuine issue for trial.
3 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving
4 party fails to make such a showing for any of the elements essential to
5 its case for which it bears the burden of proof, the trial court should
6 grant the summary judgment motion. *Id.* at 322. When considering a motion
7 for summary judgment, the Court does not weigh the evidence or assess
8 credibility; instead, "the evidence of the non-movant is to be believed,
9 and all justifiable inferences are to be drawn in his favor." *Anderson*,
10 477 U.S. at 255. When ruling on cross-motions for summary judgment, the
11 Court has a duty to review the record supporting the parties' motions and
12 to determine whether there are issues of material fact precluding summary
13 judgment. *Fair Housing Council of Riverside Cnty., Inc.*, 249 F.3d at
14 1136.

15 Here, both TRCY and BNSF have moved for summary judgment. Both
16 parties agree that there are no genuine issues of material fact, and after
17 reviewing the record in this matter, the Court finds that there are none.
18 Summary judgment is thus appropriate if either party is entitled to
19 judgment as a matter of law.

20 **B. Applicable Law**

21 When interpreting a contract under Washington law, the Court attempts
22 to "ascertain the parties' intentions and give effect to their
23 intentions." *Taylor-Edwards Warehouse & Transfer Co. of Spokane, Inc. v.*
24 *Burlington N., Inc.*, 715 F.2d 1330, 1334 (9th Cir. 1983) (citing *Jones v.*
25 *Hollingsworth*, 88 Wn.2d 322, 326 (1977)). Under Washington law, extrinsic
26 evidence is only admissible "as to the entire circumstances under which

1 the contract was made, as an aid in ascertaining the parties' intent."
2 *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990). When a contract is
3 unambiguous and its formation is undisputed, the interpretation of the
4 contract is a question of law that is appropriate for resolution on
5 summary judgment. See, e.g., *Mfg'd Hous. Cmty. of Wash. v. St. Paul*
6 *Mercury Ins. Co.*, 660 F. Supp. 2d 1208, 1212 (W.D. Wash. 2009) (citing
7 *Mayer v. Pierce Cnty. Med. Bureau*, 80 Wn. App. 416, 420 (1995)).

8 **C. The Parties' Positions**

9 TCRY concedes that BNSF has the right to operate directly on a
10 portion of the Richland Trackage, but argues that language in the 1947
11 Agreement geographically restricts the United States' grant to BNSF and
12 UP's predecessors to direct service between points "C" and "E" on the map
13 attached as Exhibit A to the 1947 Agreement. Because point "E" on Exhibit
14 A to the 1947 Agreement is the present-day site of TCRY's interchange
15 facility, TCRY argues that BNSF and UP should be enjoined from directly
16 serving points north of the interchange facility, and should be required
17 to interchange with TCRY in order to serve customers north of the
18 interchange facility. Alternatively, TCRY argues that BNSF
19 and UP's operating rights should terminate at the wye built a short
20 distance north of the interchange facility.

21 TCRY also asserts, in an argument developed primarily in its reply
22 memorandum, that the 1947 Agreement only grants the railroads rights to
23 use trackage between points "C" and "E" on Exhibit A for the purpose of
24 interchanging rail traffic with the government, and not to provide direct
25 rail service to customers along that track. Finally, TCRY argues that it
26 would be unfair to allow BNSF and UP to directly service customers north

1 of the interchange facility because pursuant to the 1998 Maintenance and
2 Operation Agreement, it is charged with the sole responsibility for
3 maintaining the Richland Trackage. TCRY requests a permanent injunction
4 prohibiting BNSF and UP from traveling north of its interchange facility.

5 BNSF argues that because the wye pictured in Exhibit A to the 1947
6 Agreement was later built to the north of the interchange facility
7 (instead of to the south as represented in Exhibit A), the 1947 Agreement
8 does in fact grant the railroads operating rights north of the interchange
9 facility. BNSF further argues that Sections 2 and 3 of the 1961 agreement
10 extended the Railroads' operating rights to the entirety of the Richland
11 Trackage, limited only by the broad requirement that their operations be
12 for the purpose of "moving freight shipments."³ BNSF requests a

13
14 ³ BNSF also argues that TCRY's argument is foreclosed by the law of
15 the case. However, the Court's September 28, 2009 Order Granting BNSF's
16 Motion for Preliminary Injunction expressly stated that the Court's
17 preliminary injunction ruling was "not binding on the Court in future
18 proceedings in this case." ECF No. [93](#) at 2; see also *Sierra On-Line, Inc.*
19 *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984)
20 (recognizing that trial court's findings regarding a party's probability
21 of success on the merits are not binding on future stages of the case).
22 Furthermore, while the Court's July 1, 2011 Order held that TRCY leasehold
23 rights were "subject to UP and BNSF's continued use of the Richland
24 Trackage, as secured by the 1947 and 1961 Agreements," ECF No. [264](#) at 23,
25 the question of the exact nature and extent of the parties' rights over
26 the Richland Trackage was not then before the Court.

1 declaratory judgment recognizing its operating rights over the Richland
2 Trackage and a permanent injunction compelling TCRY to afford it equal
3 access to the Richland Trackage.

4 Intervenor-Plaintiff UP does not oppose BNSF's motion, but asks that
5 any ruling on the motion protect the "equal, just, and fair" operating
6 rights to the Richland Trackage that it was granted by the 1947 Agreement.

7 UP also asserts that BNSF does not have the right to provide direct rail
8 service to the Hanford site, but that BNSF's direct rail service rights
9 instead terminate somewhere between TCRY's interchange facility and
10 Hanford.

11 **D. Analysis**

12 **i. BNSF's Operating Rights on the Richland Trackage**

13 On close review of the underlying agreements, it is apparent that
14 BNSF's reading of the 1947 and 1961 Agreements is the correct one. While
15 the 1947 Agreement's grant to BNSF and UP's predecessors in interest is
16 explicitly limited to the "right to operate . . . between points B and E,
17 and to use said interchange facilities and wye for the purpose of
18 interchanging business with the government," ECF No. 32-[2](#) at 13, this
19 agreement was speculative and referenced trackage that had yet to be
20 built. See [id.](#) at 12 (the Commission shall lay track in "approximately
21 the location shown in yellow on said exhibit," and shall build an
22 interchange and wye "*in the vicinity* of point E." (emphasis added)). At
23 the time the 1947 Agreement was drafted, the United States was the only
24 shipper on this section of track, and security concerns prevented private
25 access to the Hanford site; thus, the Agreement's reference to point "E"
26 appears to be intended to demarcate a convenient place for interchange,

1 rather than to provide an affirmative limitation on the railroads' later
2 ability to service rail customers. But regardless of the exact intent
3 behind the 1947 Agreement, the 1961 Agreement greatly expands the United
4 States' grant to BNSF and UP.

5 The 1961 Agreement has the stated purpose of allowing the railroads
6 to "receiv[e] and deliver[] shipments routed via the Railroads and
7 consigned by or to shippers and receivers" located on spur or side tracks
8 connecting to the United States' tracks. ECF No. 32-3 at 62. As noted
9 above, Section 3 of the 1961 Agreement states as follows:

10 The Commission hereby grants the Railroads the right to operate
11 with their employees and equipment over such segments of the
12 Government's tracks shown on Exhibit "A" as it may be necessary
to use for the purpose of moving freight shipments to or from
the tracks covered by this agreement.

13 Id. at 63. Exhibit A to the 1961 Agreement is a detailed map depicting
14 the entirety of the Richland Trackage, minus the subsequently-built Port
15 trackage and spurs extending west from the wye. The above-quoted language
16 grants BNSF and UP broad operating rights over the Richland Trackage, and
17 bulwark's BNSF's position.

18 TCRY makes much of Section 3's limitation that the railroads may only
19 use such segments of the tracks as may be necessary to access "the tracks
20 covered by this agreement." TCRY argues that because Section 1 of the
21 agreement, which contains the operative language of the lease, lists only
22 sections of track *south* of the interchange facility, the "tracks covered
23 by this agreement" are all south of the interchange, and thus Section 3's
24 grant does not extend north of the interchange or wye. Section 2 of the
25 agreement, however, also grants "the Railroads, and industries served by
26 them," the right to construct additional "industrial spur, set-out, and

1 such other tracks connecting with the Government's main tracks or
2 classification yards as may be required to provide rail service for
3 industries." Id. It seems readily apparent that the Port's spur tracks
4 are "industrial spur, set-out, and such other tracks" that were
5 constructed by "the industries served by [the railroads]" as the phrase is
6 used in the 1961 Agreement. These subsequently-built tracks are thus
7 "tracks covered by" the 1961 Agreement, and it follows logically that
8 Section 3 also grants BNSF and UP the right to serve customers on these
9 later-built sections of Port trackage and spurs extending west of the wye.

10
11 TCRY also argues that Section 3's reference to "tracks shown on
12 Exhibit 'A'" precludes a reading of the 1961 Agreement that grants BNSF
13 and UP rights relating to tracks built after the Agreement, because they
14 by definition could not be shown on Exhibit A. But Section 3's reference
15 to "tracks shown on Exhibit 'A'" relates to the section of track over
16 which BNSF and UP are afforded rights, not the Section's later use of the
17 phrase "tracks covered by this agreement;" these tracks are precisely the
18 tracks over which BNSF and UP seek access. This interpretation of the
19 1961 Agreement is supported by its stated purpose of opening up the
20 Richland Trackage to common carrier rail service in order to promote
21 industrial development in the Richland area. Of course, BNSF and UP's
22 right to use the Richland Trackage may only be "for the purpose of moving
23 freight shipments."

24 /

25 Accordingly, the Court finds that the 1961 Agreement grants BNSF and
26 UP the right to operate directly on the Richland Trackage. This right

1 extends north of the TCRY interchange facility, and includes both the spur
2 tracks to the west of the wye and the main-line tracks north to Horn
3 Rapids Road. Neither BNSF nor UP has a right to serve the Hanford site
4 directly.

5 **ii. UP's Operating Rights on the Richland Trackage**

6 UP's position is clearly supported by the 1947 Agreement. The 1947
7 Agreement grants both BNSF and UP's predecessors in interest "the equal
8 joint right" to operate on the relevant section of track. ECF No. 32-[2](#)
9 at 13. This grant includes the future-looking assurance that "any right
10 or privilege at any time granted by the Commission to one of said
11 companies in respect to its operations shall be a right or privilege which
12 the other company may at its option exercise in respect to its
13 operations." [Id.](#) Furthermore, the Agreement requires BNSF and UP's
14 predecessors to "agree from time to time upon rules and regulations" for
15 the use of the Richland Trackage, and requires that such rules and
16 regulations "shall be equal, just, and fair," and "shall not unjustly
17 discriminate against either." [Id.](#) at 14. These portions of the 1947
18 Agreement have not been modified by later agreement, and remain in force
19 today. As such, the Court includes UP in any declaratory or injunctive
20 relief it affords BNSF.

21 **E. Relief Granted**

22 **i. Declaratory Judgment**

23 Under the Declaratory Judgment Act, 28 U.S.C. § 2201, declaratory
24 judgment is proper when one party has established that "there is a
25 substantial controversy, between parties having adverse interest, of
26 sufficient immediacy and reality to warrant issuance of a declaratory

1 judgment." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th
2 Cir. 2002) (quoting *Western Min. Council v. Watt*, 643 F.2d 618, 624 (9th
3 Cir. 1981)). Here, the factual background of this case unquestionably
4 demonstrates that such a controversy exists and that declaratory judgment
5 is proper.

6 BNSF requests a declaratory judgment recognizing its rights to
7 provide direct rail service over the Richland Trackage.⁴ For the reasons
8 discussed above, the Court grants BNSF's request in this regard, and
9 issues a declaratory judgment recognizing both BNSF and UP's rights to
10 provide direct rail service over the Richland Trackage.

11 **ii. Permanent Injunction**

12 BNSF also requests a permanent injunction compelling TCRY to allow
13 it access over the Richland Trackage and requiring TCRY to coordinate
14 train scheduling and dispatching with BNSF and UP.

15 Permanent injunctive relief is proper when a party can show "(1) that
16 it has suffered an irreparable injury; (2) that remedies available at law,
17 such as monetary damages, are inadequate to compensate for that injury;
18 (3) that, considering the balance of hardships between the plaintiff and
19 defendant, a remedy in equity is warranted; and (4) that the public
20 interest would not be disserved by a permanent injunction." *eBay Inc. v.*
21

22 ⁴ TCRY argues that BNSF's requested relief must be denied because BNSF
23 failed to name the Port and UP, who are necessary parties under Federal
24 Rule of Civil Procedure 19. However, any argument that BNSF has
25 improperly failed to join the Port and UP was rendered moot when they
26 intervened in this lawsuit.

1 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The first factor, the
2 existence of irreparable injury, is also satisfied by a continuing and
3 imminent threat of harm. *See, e.g., Bowler v. Home Depot USA Inc.*, No. C-
4 09-5523 JCS, 2011 WL 166140, at *3 (N.D. Cal. January 19, 2011) (citing
5 *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2760 (2010)). The
6 decision to grant or deny permanent injunctive relief is within the
7 Court's discretion. *See eBay Inc.*, 547 U.S. at 391 (citing *Weinberger v.*
8 *Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

9 Here, BNSF fulfills the first two factors because the percipient loss
10 of customer goodwill that will occur if TCRY again blocks it from
11 accessing the Richland Trackage is imminent; the loss of consumer goodwill
12 is an irreparable injury, and legal remedies are inadequate to compensate
13 for that injury. *See Rent-A-Center, Inc. v. Canyon Television & Appliance*
14 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Regents of Univ. of Cal.*
15 *v. Am. Broad. Cos.*, 747 F.2d 511, 519-20 (9th Cir. 1984). The balance of
16 hardships between BNSF and TCRY also runs in BNSF's favor: While TCRY is
17 currently tasked with maintaining the Richland Trackage under the 1998
18 Maintenance and Operation Agreement and the 2002 Lease, as the Court has
19 already found, TCRY took possession of the Richland Trackage subject to
20 BNSF and UP's pre-existing rights; the temporary hardship TCRY will suffer
21 under its contract with the Port is outweighed by the long-term hardship
22 BNSF and UP would suffer if their rights under the 1947 and 1961
23 Agreements were permanently abrogated. Finally, as the Court found in its
24 Order granting BNSF's motion for a preliminary injunction, ECF No. [93](#) at
25 10-11, it is in the public interest to encourage competition among the
26

1 railroads and to ensure that railroad service remains efficient.
2 Accordingly, a permanent injunction is proper.

3 TCRY argues that if such relief is granted, the injunction should not
4 be "asymmetrical." TCRY cites *Earth Island Inst. v. Carlton*, 626 F.3d
5 462, 469 (9th Cir. 2010), in support of this position, but this case
6 mentions no such consideration, and simply affirms a district court's
7 preliminary injunction issued under the *Winter* framework. TCRY asserts
8 that an order enjoining only it would be unfair because it would "give[]
9 only one party the asymmetric right to seek an order of contempt over any
10 claim of contract breach." ECF No. [283](#) at 15. However, only TCRY is in
11 breach of the 1947 and 1961 Agreements, and BNSF has committed no harm
12 that need be redressed with equitable relief. Furthermore, the Court's
13 contempt power will only be available for breach of the *injunction*, and
14 both parties will retain the ability to seek legal relief for breach of
15 the underlying contract. As such, the Court denies TCRY's request for a
16 "symmetrical" injunction.

17 For the reasons discussed above, the Court grants BNSF's request and
18 issues a permanent injunction requiring TCRY 1) to allow both BNSF and UP
19 to directly serve customers along the Richland Trackage, and 2) to
20 coordinate train scheduling and dispatching with both BNSF and UP. The
21 parties shall meet and confer to develop a comprehensive operational plan
22 as detailed below.

23 **F. Conclusion**

24 For all of the historical complexity surrounding the Richland
25 Trackage, the relative rights of the parties are actually quite simple:
26

1 The United States granted BNSF and UP's predecessors in interest full
2 rights to operate on the Richland Trackage, and TCRY took possession of
3 the Richland Trackage subject to these rights. Accordingly, the Court
4 issues a declaratory judgment recognizing BNSF and UP's operating rights,
5 and issues a permanent injunction protecting these rights.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. BNSF's Motion for Summary Judgment, **ECF No. [273](#)**, is **GRANTED**.
8 Both BNSF and UP shall have the right to operate directly on the Richland
9 Trackage. Representatives from BNSF, TCRY, and UP shall meet and confer
10 at a mutually-convenient time and place - either by phone or in person -
11 and draft a comprehensive operational plan (COP), consistent with the
12 Court's ruling, that is signed and agreed upon by all three parties. A
13 representative of the Port shall be permitted to attend and offer
14 comments. The COP shall cover trackage from the Richland junction to Horn
15 Rapids Road (and all spurs that spring therefrom). The proposed COP shall
16 be filed for Court approval **no later than 5:00 p.m. on December 23, 2011**
17 unless on or before that date, BNSF, TCRY, and UP file with the Court a
18 joint stipulation to a later date. The Port shall have seven (7) days
19 after the filing of the proposed COP in which to file a statement with the
20 Court stating its comments or objections to the proposed COP. The parties
21 shall have seven (7) days after the filing of the Port's statement in
22 which to file individual or joint reply to the Port's statement. No other
23 responsive or reply memoranda will be considered.

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1 2. All pending motions are **DENIED as moot.**

2 **IT IS SO ORDERED.** The District Court Executive is directed to enter
3 this Order and distribute copies to counsel.

4 **DATED** this 14th day of December 2011.

5
6 s/Edward F. Shea

EDWARD F. SHEA

7 United States District Judge
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